

Selected Documents from Claim File

Claim No. LRF-1998-0520-01

CLAIM PAYMENT CHECKLIST

To be used for claims arising prior to 07/01/98

I. General Information

LRF Claim No: <u>1998-0520-01</u>	Related Claim Nos: <u>None</u>
1. Claimant: Name: <u>HANSEN INSULATION, INC.</u> Address: <u>175 S GENEVA RD</u> City, State, Zip: <u>LINDON UT 84042</u> Telephone: <u>(801) 785-4800</u> DOPL/LRF No: <u>95-242517-5501</u>	
2. Claimant's Legal Counsel: Name/Law Firm: <u>HOWARD CHUNTZ</u> Address: <u>1149 WEST CENTER ST</u> City, State, Zip: <u>OREM UT 84057</u> Telephone: <u>(801) 222-9700</u>	
3. Non-Paying Party/Permissive Party: (Entered Appearance <u>Yes</u> <input checked="" type="checkbox"/> <u>No</u>) Name: <u>FALCON BUILDERS</u> Address: <u>459 WEST 2600 NORTH</u> City, State, Zip: <u>LEHI UT 84043</u> Telephone: <u></u> DOPL No: <u>313725</u>	
4. Non-Paying Party/Permissive Party's Legal Counsel: Name/Law Firm: <u>N/A</u> Address: <u>N/A</u> City, State, Zip: <u>N/A</u> Telephone: <u>N/A</u>	
5. Original Contractor: Name: <u>FALCON BUILDERS</u> Address: <u>459 WEST 2600 NORTH</u> City, State, Zip: <u>LEHI UT 84043</u> Telephone: <u></u> DOPL No: <u>313725</u>	
6. Amount claimed: <u>\$2,810.47</u>	
7. Owner: Name: <u>JAY D ADAMS</u> Address: <u>2546 NORTH 670 WEST</u> City, State, Zip: <u>LEHI UT 84043</u> Telephone: <u></u>	

8. Subsequent Owner: _____ Date: _____	
Name: _____ N/A _____	
Address: _____ N/A _____	
City, State, Zip: _____ N/A _____	
Telephone: _____ N/A _____	
9. Owner-Occupied Residence:	
Address/Location: <u>2546 NORTH 670 WEST LEHI UT 84043</u>	
Legal Description: <u>All Of Lot 137, Plat "C", Pioneer Estates Subdivision</u>	
10. Claim Classification: _____ Formal _____ <u>X</u> Informal	

II. Claim Processing Information

Initial Claim Processing -- All Claims:	Received	Forwarded
Front Desk	05/20/98	n/a
LRF Specialist--set up file, notice of filing, CRIS entry	n/a	05/26/98
Permissive Party response Deadline: <u>06/26/98</u>	05/26/98	n/a
LRF Specialist/Claims Examiner--screening, c/d letter Reason(s) for conditional denial: <u>n/a</u>	05/26/98	08/03/98
LRF Coordinator/Claims Examiner--review	08/03/98	08/04/98
Claimant--response to c/d letter Deadline: _____	n/a	n/a
LRF Coordinator/Claims Examiner--substantive review, c/d letter, or recommendation and disposition letter(s). Reason(s) for conditional denial: _____	n/a	n/a
Claimant response to c/d letter Deadline: _____	n/a	n/a
LRF Coordinator/Claims Examiner--review	08/04/98	08/04/98
Section's Recommended Disposition --ALL CLAIMS:		
___ Approve for full payment ___ Approve for partial payment <u>X</u> Deny ___ Dismiss		
Date: <u>08/04/98</u>		
Reason(s): <u>Claim was not timely filed.</u>		

Board's Recommended Disposition -- INFORMAL CLAIM:

☐ Approve for full payment ☐ Approve for partial payment ☐ Deny ☐ Dismiss

Date: N/A

Reason(s): N/A - summary denial

FINAL ORDER -- ALL CLAIMS:

☐ Approve for full payment ☐ Approve for partial payment ☒ Deny ☐ Dismiss

Date: _____

Reason(s): Claim not timely filed.

If Order is fully or partially denied:

Reason(s) for denial: Claim not timely filed; filed 132 days after entry of civil judgment.

Appeal deadline: 9/4/98

Date request for agency review filed: 08/14/98

Date/Nature of Order: affirmed 09/17/98

III. Jurisdiction Checklist

Y/N	Inits	Date	Issue
NO	ljb	08/04/98	Is Application Jurisdictionally Sound?
YES	ljb	05/04/98	<p>A. Claimant brought civil action against the non-paying party within 180 days from the last day claimant provided qualified services, which action was to recover monies owed him for the services, or was precluded from doing so by the non-paying party's bankruptcy filing within 180 days of claimant's completion of qualified services.</p> <p>(38-11-204(3)(d)(i)(A) and (iv).</p> <p><u>Claimant states that it provided services from 04/29/97 through 05/30/97. (Claim file p. 2) Claimant has not submitted any invoices to corroborate this statement. Claimant's complaint was dated on 11/20/97, but is not date stamped by the court. (Claim file p. 27) Claimant, however, states that the complaint was filed on November 21, 1997. (Claim file p. 3) Assuming that claimants stated dates can be corroborated, the relevant period of time is between 05/30/97 and 11/21/97, 175 days. 175 days is less than the 180 day statutory period so, assuming that these dates can be corroborated, the civil action was timely filed.</u></p>

YES	ljb	08/04/98	<p>B. If civil action filing is required, notice of commencement of action was timely filed within 30 days of claimant's filing of civil action. (38-11-204(3)(d)(i)(B)).</p> <p><u>Claimant stated that the civil action was filed on 11/21/97, but has not corroborated this with a time stamp from the court. Claimant stated that his Notice of Commencement of Action was filed on 12/04/97, but has not provided a copy of his Notice. (Claim file as of 08/04/98) LRF records, however, corroborate this date. (NCA log) The NCA was, therefore, filed 13 days after the civil action filing, within the 30 day statutory period.</u></p>
NO	ljb	08/04/98	<p>C. Claim application was timely filed within 120 days of the civil judgment or bankruptcy filing. (38-11-204(2)).</p> <p><u>Claimant's default and default judgment was entered on 01/08/98. (Claim file p. 20) The present claim was filed on 05/20/98. (LRF records) The present claim was filed 132 days after the entry of the judgment, outside of the 120 day statutory period. The claim was, therefore, not timely filed and the division does not have jurisdiction to pay it.</u></p>

VIII. Demographic Data

Source: Claimant's Demographic Questionnaire.

1. Type of business entity used by claimant: ___ Sole Proprietorship ___ Partnership ___ Joint Venture <u>X</u> Corporation ___ LLC ___ Other	
2. Number of employees employed by claimant: ___ None ___ 1-4 ___ 5-9 ___ 10-19 ___ 20-49 ___ 50-99 <u>X</u> 100+	
3. Claimant's gross annual revenue: ___ 0-\$9,000 ___ \$10,000-\$49,000 ___ \$50,000-\$99,000 \$100,000-\$249,000 <u>X</u> \$250,000-\$499,000 ___ \$500,000-\$999,000 ___ \$1,000,000-\$4,999,000 ___ \$5,000,000+	
4. Number of years claimant has been in business: ___ 0-1 ___ 2-4 ___ 5-9 ___ 10-14 <u>X</u> 15-19 ___ 20+	
5. Capacity in which claimant is claiming: ___ General Contractor <u>X</u> Subcontractor ___ Supplier ___ Other _____	
6. Is claimant licensed through DOPL? <u>X</u> yes ___ no	

7. Type of business entity used by non-paying contractor or real estate developer, if known: <input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Partnership <input type="checkbox"/> Joint Venture <input type="checkbox"/> Corporation <input checked="" type="checkbox"/> LLC <input type="checkbox"/> Unknown
8. Number of employees employed by non-paying party, if known: <input type="checkbox"/> None <input type="checkbox"/> 1-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-19 <input type="checkbox"/> 20-49 <input type="checkbox"/> 50-99 <input type="checkbox"/> 100+ <input checked="" type="checkbox"/> Unknown
9. Non-paying party's gross annual revenue, if known: <input type="checkbox"/> 0-\$9,000 <input type="checkbox"/> \$10,000-\$49,000 <input type="checkbox"/> \$50,000-\$99,000 <input type="checkbox"/> \$100,000-\$249,000 <input type="checkbox"/> \$250,000-\$499,000 <input type="checkbox"/> \$500,000-\$999,000 <input type="checkbox"/> \$1,000,000-\$4,999,000 <input type="checkbox"/> \$5,000,000+ <input checked="" type="checkbox"/> Unknown
10. Number of years non-paying party has been in business, if known: <input type="checkbox"/> 0-1 <input type="checkbox"/> 2-4 <input type="checkbox"/> 5-9 <input type="checkbox"/> 10-14 <input type="checkbox"/> 15-19 <input type="checkbox"/> 20+ <input checked="" type="checkbox"/> Unknown
11. Is non-paying party licensed through DOPL? <input type="checkbox"/> yes <input type="checkbox"/> no <input checked="" type="checkbox"/> Unknown

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State of Utah

DEPARTMENT OF COMMERCE

DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

Michael O. Leavitt
Governor

Douglas C. Borba
Executive Director

J. Craig Jackson, R. Ph.
Division Director

Heber M. Wells Building
160 East 300 South, P.O. Box 146741
Salt Lake City, Utah 84114-6741
(801) 530-6628 Fax: (801) 530-6511
Investigations Fax: (801) 530-6301
<http://www.commerce.state.ut.us/web/commerce/dopl/dopl1.htm>

August 4, 1998

HANSEN INSULATION, INC.
175 S GENEVA RD
LINDON UT 84042

RE: Lien Recovery Fund Claim No. 1998-0520-01
Claimant: HANSEN INSULATION, INC.
Original Contractor: FALCON BUILDERS
Non-paying Party: FALCON BUILDERS
Homeowner: JAY D. ADAMS

Dear Claimant:

DENIAL OF CLAIM

After review of the above-referenced claim application by the Division of Occupational and Professional Licensing and the Lien Recovery Fund Advisory Board, your claim with the Residence Lien Recovery Fund is denied for the following reason:

The evidence submitted indicates that claimant Hansen Insulation, Inc. failed to file its claim application with the Residence Lien Recovery Fund within 120 days from the date that judgment was entered in its civil action against Falcon Builders.

To qualify for payment of a claim, UTAH CODE ANN. § 38-11-204(2) (1996) requires a claimant to file an application with the fund no later than 120 days from the date that judgment is entered in a civil action against the non-paying party, or if precluded by bankruptcy, no later than 120 days from the date the non-paying party filed bankruptcy.

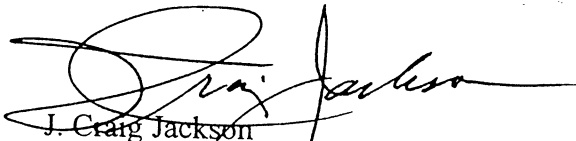
In this case, your application was filed on May 20, 1998, which is 132 days from the date the judgment was filed in your civil action against Falcon Builders. As a result, the Division has no jurisdiction over this matter and, therefore, cannot pay this claim.

CHALLENGE AFTER DENIAL OF CLAIM:

Under the terms of R156-46b-202(j), Utah Administrative Code, your claim has been classified by the Division as an informal proceeding. You may challenge the denial of your claim by filing a request for agency review.

If you choose to file a request for agency review, you must follow the attached procedures.

Sincerely,



J. Craig Jackson
Director, Division of Occupational and Professional Licensing

i:\home\dopl\claims\98052001.den

MAILING CERTIFICATE

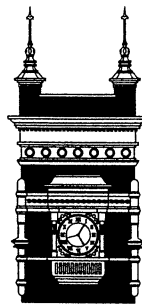
I hereby certify that on the 6th day of August, 1998, a true and correct copy of the foregoing information was sent first class mail, postage prepaid to the following people:

Howard Chuntz
1149 West Center Street
Orem, Utah 84057

Falcon Builders
459 West 2600 North
Lehi, Utah 84043

1149 WEST CENTER STREET

OREM, UTAH 84057



PHONE: 222-9700 FAX: 224-9960

SALT LAKE CITY: 328-2240

RECEIVED

DR. HOWARD CHUNTZ

ATTORNEY AT LAW

August 12, 1998

UTAH DEPT. OF
COMMERCE

Douglas C. Borba, Executive Director
Utah Department of Commerce
160 East 300 South
P.O. Box 146701
Salt Lake City, UT 84114-6701

RECEIVED

SEP 10 1998

DIVISION OF OCCUPATIONAL
& PROFESSIONAL LICENSING

RE: Lien Recovery Fund Claim No. 1998-0520-01
Claimant: Hansen Insulation, Inc.
Original Contractor: Falcon Builders
Non-paying Party: Falcon Builders
Homeowner: Jay D. Adams

Dear Mr. Borba:

REQUEST FOR AGENCY REVIEW

Hansen Insulation, Inc., submits its request for agency review in the above captioned matter on the basis that the requirement that the filing of claim within 120 days from the date that judgment was entered is procedural and not jurisdictional and that extenuating circumstances often make it impossible to comply with said requirement.

Claims for payment by sub-contractors and materialmen often start with the filing of a mechanic's lien. Prior to timely commencement of a lawsuit against the owner and contractor, the sub-contractor and/or materialmen has no idea whether his collection action will end up with the Residence Lien Recovery Fund because he has no idea whether the owner has paid the contractor in full or has met the other requirements of the Act. After service of summons and complaint upon the contractor and the owner, the owner and/or his attorney generally contacts counsel for the sub-contractor/materialmen to advise that the action is covered by the Residence Lien Recovery Act. But often does not provide complete or timely documentation to support that fact. In the meantime, the contractor generally fails to answer the complaint and a default judgment is entered against the contractor so that other real property that said contractor may have an interest in might be tied up and available for payment of the debt.

It is not unusual that it takes the homeowner several months to acquire all of the appropriate documentation to support his position that he is covered by the Residence Lien Recovery Act and that after several communications between the sub-contractor/materialmen's attorney and counsel for the homeowner. That was the situation that occurred with Hansen Insulation, Inc., Falcon Builders, and the homeowner, Jay D. Adams. In addition, the matter

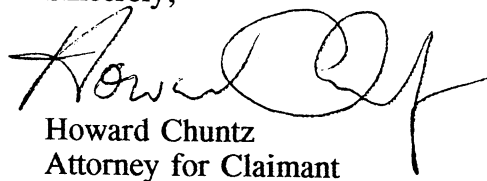
August 12, 1998
Page 2

was further delayed by the fact that the member partners of the contractor Falcon Builders, LLC, filed Chapter 13 Bankruptcies and were not available for supplemental proceedings with respect to the limited liability company for several months. The limited liability company itself, Falcon Builders, LLC, did not file a bankruptcy and, therefore, the bankruptcy provisions of the Act, did not apply in this case.

Hansen Insulation, Inc., was precluded by the facts and circumstances that existed in this matter from knowing that it had a lien recovery fund claim to make rather than against the owner for several months and then could not make its claim because of delays in obtaining the supplemental proceedings against the contractor because its members were in bankruptcy.

Wherefore, claimant requests that the 120 day filing requirement be waived and that its claim be approved.

Sincerely,



Howard Chuntz
Attorney for Claimant

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 13th day of August, 1998, to the following:

Falcon Builders
459 West 2600 North
Lehi, UT 84043

Hansen Insulation, Inc.
175 South Geneva Rd.
Lindon, UT 84042

re req



BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF
HANSEN INSULATION, INC.

: **FINDINGS OF FACT,**
: **CONCLUSIONS OF LAW and**
: **RECOMMENDED ORDER**
:
: Case No. LRF 1998-1022-01

INTRODUCTION

This matter came on for hearing upon a request for agency review filed by or on behalf of Hansen Insulation, Inc. (hereafter "Petitioner") seeking to appeal an adverse action taken by the Division of Occupational and Professional Licensing (hereafter "Division") with which Petitioner is aggrieved.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

ISSUES REVIEWED

1. Whether Petitioner has filed an appeal upon which relief might be granted.

FINDINGS OF FACT

1. This case is a second appeal from a Residence Lien Recovery Fund (hereafter "LRF") claim denied by the Division on a second LRF claim application based upon the same underlying facts being filed by Petitioner after Petitioner had had its default judgment set aside and reentered for the purpose of obtaining a new date on the judgment.

2. Petitioner failed to file a copy of the order appealed from in this case or any documentation in support of its request for review. Therefore the facts relied upon in this matter are drawn exclusively from the Division files and the Executive Director's file on the prior appeal in this same matter.

3. Petitioner obtained a default judgment against Falcon Builders ("builder") for construction work performed by it on the home of Jay D. Adams ("homeowner") in Fourth District Court Civil No. 970003140 on January 8, 1998 for the amount due Petitioner with additional sums for its attorney's fee and costs.

4. On May 20, 1998 Petitioner filed its LRF claim (LRF-1998-0520-01) with the Division.

5. On August 4, 1998 the Division denied Petitioner's LRF claim as not having been timely filed within 120 days from the entry of the judgment against the defaulting builder.

6. On August 14, 1998 the Petitioner filed a Request for Agency Review alleging that extenuating circumstances had prevented a timely filing of the LRF claim with the Division. In consideration of that appeal the Executive Director found that the circumstances set forth by Petitioner consisted of vague generalities of potential problems which could arise and were either not specific to the case on appeal, were irrelevant to the appealed case, or else were not convincing. The resulting order upheld the Division's order citing the 120 day filing period as being jurisdictional [*Hansen Insulation, Inc.*, DOPL Case No. LRF-1998-0520-01 (Order on Review entered September 17, 1998)].

7. On the same day that Petitioner filed its appeal with the Executive Director,

August 14, 1998, it also filed a Motion to Set Aside Default Judgment in Fourth District Court which stated, in full:

COMES NOW plaintiff, by and through its attorney,
Howard Chuntz, pursuant to Rule 41(a) and moves the Court for
an order setting aside default judgment entered against defendants
without prejudice.

8. On October 16, 1998 the Clerk of the Fourth District Court entered another default in the civil case against the builder certifying that the defaulting builder had been served with the summons and complaint but had failed to appear and answer.

9. On October 16, 1998 a second default judgment was entered against the builder by Fourth District Court Judge Guy R. Burningham.

10. On or about October 20, 1998 the Petitioner filed a judicial appeal of the Executive Director's September 17, 1988 Order on Review in the Fourth Judicial District Court as case Civil No. 98-0405-982AA.

11. On October 22, 1998 Petitioner filed the LRF claim giving rise to this appeal. The second claim is substantially identical to its earlier LRF claim except for the altered date of the default judgment against the defaulting builder.

12. On November 20, 1998 the Division again ruled against Petitioner's LRF claim on the ground that it had been untimely filed initially and that, despite Petitioner's attempts at circumvention of the governing law, the Division continued to be without jurisdiction to consider it.

13. Process in Civil No. 98-0405-982AA was served upon the Division on December 10, 1998 and an answer was filed on behalf of the Division on or about December 28, 1998 in Fourth District Court where it is currently pending.

14. On December 17, 1998 the Petitioner filed its second request for agency review in this matter with the Executive Director alleging that the 120 day filing period is a procedural rather than a jurisdictional requirement and argues that the "Savings Statute" as set out in the

Utah Code is applicable to this matter. Petitioner therefore claims that it is entitled to a consideration of this claim on the merits.. Petitioner's request for agency review did not include a copy of the order of the Division from which an appeal was being sought.

CONCLUSIONS OF LAW

1. This appeal is one of several filed by the same attorney on behalf of this Petitioner and others of his clients from denials of their LRF claims for failure to file a LRF claim pursuant to UTAH CODE ANN. §38-11-204(2) which provides, in part, that in order "[t]o recover from the fund, the application . . . **shall be filed no later than 120 days . . .** from the date the judgment . . . is entered" (emphasis added). This case is also currently pending as a judicial appeal in the Fourth District Court from the September 17, 1998 order entered by the Executive Director.
2. The transmittal to Petitioner of the Division's November 20, 1998 Order included, in addition to the order, a copy of the department rules applicable to departmental administrative appeals together with instructions as to the minimal requirements which had to be met in order to obtain agency review. Among other things the rules provide, in UTAH ADMIN. R151-46b-12:
 - (3) Content of a Request for Agency Review and Submission of the Record.
 - (a) The content of a request for agency review shall be in accordance with Subsection 63-46b-12(1)(b). **The request for agency review shall include a copy of the order which is the subject of the request.**
 - (b) A party requesting agency review shall set forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to appropriate legal authority and to the relevant portions of the record developed during the adjudicative proceeding.
 - (c) If a party challenges a finding of fact in the order subject to review, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence. A party

challenging a legal conclusion must support their argument with citation to any relevant authority and also cite to those portions of the record which are relevant to that issue. . . .

(f) Failure to comply with this rule may result in dismissal of the request for agency review. (Emphasis added).

3. Although the matter is fully within his discretion, the Executive Director has adopted a policy of dismissing out-of-hand any request for agency review which does not contain a copy of the order appealed, since there is no legitimate excuse for an improper filing when the rules are furnished to the aggrieved party by the Division along with a of a letter of instructions and warnings as to the procedures which must be followed in order to perfect an appeal. An even more compelling reason in this case for following this policy is that the Petitioner is represented by an attorney who has previously filed several appeals with the Executive Director and should be familiar, both by training and experience, with the proper procedures to perfect and pursue an appeal.

4. It is recommended that the general policy be suspended in the instant case as was done in the first case in this series of appeals, *BMC West Building Products*, LRF-1998-1104-01 (Order on Review entered February 11, 1999). The permissive nature of the department rule should be applied since Petitioner's attorney filed a number of appeals herein at approximately the same time all of which involved the same issues and all of which suffered from various and sundry fatal defects which bear commenting upon to offer both instruction and serve as a cautionary tale for those practicing before this tribunal.

5. The rationale for dismissing appeals not in compliance with the filing requirement - that the appealing party has failed to furnish information to the Executive Director sufficient to permit him to render a considered opinion - does not apply in this case as the Division has furnished its files which provide ample information, both in connection with this appeal and the others presently pending, to allow the Executive Director to conduct a review on such merits as might be present. Therefore this appeal should not be dismissed solely for the failure of Petitioner to make a proper filing.

6. The first matter which must be addressed in this appeal is the pendency of appeals on the LRF claim before both the Executive Director and the Fourth District Court. Obviously if the matter appealed to the Executive Director is properly before the Fourth District Court, a superior tribunal, it cannot be countenanced herein.

7. Petitioner's Petition for Judicial Review, which was filed with the Fourth District Court is an appeal the September 17, 1998 Order on Review entered by the Executive Director on this same case during its previous LRF claim incarnation.

8. In order to avoid the appearance of attempting to usurp the authority of the Fourth District Court, which is superior to this tribunal, it is necessary that this appeal of the Division's November 20, 1998 Order be treated separate and apart from the matter on judicial appeal and review herein be limited to the issue raised by Petitioner in its request for agency review.

9. Since enactment of the LRF the untimely filing of claims and their resulting denials by the Division has been the chief reason for appeals to the Executive Director from LRF decisions of the Division. The Executive Director has consistently held in previously decided cases, including several represented by Petitioner's counsel herein, that the language contained in UTAH CODE ANN. §38-11-204(2) is jurisdictional rather than procedural, and that a failure by a claimant to properly file a LRF claim in a timely manner within 120 days from obtaining a judgment deprives the Division of any jurisdiction to consider the claim.

10. A 1998 amendment to the statutory LRF claim filing requirements section which includes the 120 requirement added UTAH CODE ANN. §38-11-204(3)(e):

(e) If a qualified beneficiary fails to file the notice with the division required under Subsection (3)(c)(i)(B), the claim of the qualified beneficiary shall be paid:

- (i) if otherwise qualified under this chapter;
- (ii) to the extent that the limit of Subsection 38-11-203(4)(a)(i) has not been reached by payments from the fund to qualified beneficiaries who have complied with the notice requirements of Subsection (3)(c)(i)(B); and
- (iii) in the order that the claims are filed by persons who fail to comply with Subsection (3)(c)(i)(B), not to exceed the

limit of Subsection 38-11-203(4)(a)(i).

11 The 1998 amendment operates as a partial savings statute for those claimants failing to notify the Division of their having filed suit as required by the statute. Under the amendment instead of a claim being summarily dismissed for late notice it is placed at the end of the list of the properly made claims and, if deemed valid and sufficient funds remain after payment of other claims, may be paid by the Division.

12. The carving out of this exception by the legislature to make notice of the commencement of an action procedural reinforces the Executive Director's earlier opinions as to the jurisdictional aspect of the other filing deadlines set forth in the same section since the legislature felt compelled to highlight and except the notice to the Division provision as being procedural in nature. Such singling out of this solitary time requirement among many time requirements contained in the section only serves to indicate that the legislature considered all other time requirements in the section as being and continuing to be jurisdictional.

13. Petitioner's only claimed ground for relief in this case is its reliance upon the Utah "Savings Statute", UTAH CODE ANN. §78-12-40, (hereafter "savings statute") which provides:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limit either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the reversal or failure.

14. Petitioner argues that the savings statute is applicable in this case because Petitioner filed its lawsuit against the defaulting builder in a timely manner and pursued the suit to judgment as required by the LRF act. Although Petitioner admittedly failed to file a LRF claim within 120 days after the judgment was entered, it claims that by getting the default judgment set aside and reentered the problem of its untimely filing of the claim was cured and its LRF claim could be refiled and considered on its merits pursuant to the savings statute.

15. This argument is not sustainable. In order to have any relevance, the savings statute would of necessity have to be applied to the LRF claim application filing with the Division and not to the suit against the defaulting builder.

16. The savings statute unambiguously requires that the action be commenced in a timely manner in order to invoke the statute. The “action” in this case would have had to have been the filing of the LRF claim application, even though it does not seem to fit the terminology of the statute which refers to judgments and appears to contemplate only a legal action at law. This view of the savings statute being oblivious to administrative filings seems to be further ratified by the discussion of the applicability of the savings statute by the Utah Supreme Court in *Muir v. W.H. Burt Explosives, Inc.*, 851 P.2d 645 (Utah 1993), stating, among other things that:

[t]he word “commenced” is defined in Utah Rule of Civil Procedure 3(a), which states, “A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons.”

17. In the case at bar there was no attempt by Petitioner to “commence” its LRF claim “action” until well past the statutory 120 day “due time” for filing such an action. The fact that Petitioner somehow manipulated the judicial system to later create an altered date for its judgment against the defaulting builder is collateral and does not allow invocation of the savings statute, even assuming applicability. Petitioner’s filing and the Division’s rejection of its LRF claim both occurred after the expiration of the jurisdictional filing period and therefore was not subject to the savings statute, again accepting the wrong assumption that it would otherwise be applicable. *Hansen v. Department of Fin. Insts.*, 858 P.2d 184 (Utah App. 1993).

18. In discussing an attempted application of the savings statute to an execution writ which was filed beyond the statutory period, the Utah Supreme Court stated that:

The plaintiff has misperceived the purpose of § 78-12-40 . . . It deals exclusively with the commencement of a new action after the first action has failed or the judgment thereon has been reversed. The plaintiff’s judgment was never reversed, his first action did not fail and he did not attempt to commence a second action against

the defendants. Clearly, § 78-12-40 does not apply in this fact situation and avails the plaintiff nothing. *Billings v. Brown*, 639 P.2d 189 (Utah 1981).

19. Petitioner's reliance upon *C.P. v. Utah Office of Crime Victims' Reparations*, 354 Utah Adv. Rep. 12 (Utah App. October 16, 1998) and *Standard Fed. Sav. & Loan Ass'n v. Kirkbride*, 821 P.2d 1136 (Utah 1991) is misplaced. Those cases, as well as the other cases which have interpreted UTAH CODE ANN. §78-12-40, require that the action for which the savings statute is invoked be commenced during the statutory period for filing and must after the filing fail or be reversed. Both of the cases relied upon by Petitioner involved a timely filing which were subsequently dismissed (failed) because of no of service of process upon the opposing party. (See also, among others, *Muir v. W.H. Burt Explosives, Inc.*, *supra*).

20. In *Hansen v. Department of Fin. Insts.*, 858 P.2d 184 (Utah App. 1993) the Court of Appeals rejected a claim of coverage under the savings statute because "... the failure (of the cause of action) occurred before the two-year statutory limitation had expired, preventing the invocation of the savings statute." As was the case in *Hansen*, the statutory 120 day limitation in the case at bar had expired prior to Petitioner filing its LRF claim.

21. It is also not clear that Petitioner's claim that the savings statute applies to administrative proceedings under UAPA is a correct statement of the law. The case championed by Petitioner for this proposition, *C.P. v. Utah Office of Crime Victims' Reparations*, *supra*, holds only that the savings statute applies to judicial appeals from final agency actions. A judicial appeal to District Court can only occur after all administrative remedies have been exhausted and such a judicial appeal takes the form of a trial *de novo* proceeding governed by the Utah Rules of Civil Procedure and conducted utilizing the Utah Rules of Evidence (UTAH CODE ANN. §§63-46b-14 and 15).

22. Administrative proceedings until the entry of a final order and perfection of a judicial appeal are governed solely by UAPA. A comparison of the administrative procedures and civil procedures show that the filing requirements under UAPA in an administrative

proceeding are even more stringent than in a court of law governed by U.R.C.P., at least insofar as filing deadlines are concerned. The Utah courts have recognized (*Dusty's, infra*) that the governing authority of UAPA does not end until a judicial appeal is perfected pursuant to the UAPA provisions.

23. In the 1992 case referenced above, *Dusty's Inc. v. Auditing Div.*, 842 P.2d 868 (Utah 1992), the appellant attempted to argue that the time for filing an appeal from a final administrative order was governed by a statute other than UAPA. The Court rejected this argument stating:

It appears to this court that the statutory instructions are quite straightforward. In all administrative agency cases initiated after January 1, 1988, this court and the court of appeals have consistently been guided by the provisions of the UAPA in undertaking judicial reviews of final agency actions. Utah Code Ann. § 63-46b-22.1 As the Commission correctly points out, under the UAPA, the time periods established for judicial review are strictly construed For Dusty's future guidance and the guidance of all those who petition for judicial review from agency action, we hold that the date the order constituting the final agency action issues is the date the order bears on its face.

24. In the case at bar Petitioner is attempting to argue that by getting its default judgment set aside and then reentered the statutory savings clause commenced the running of a new clock which gave Petitioner the opportunity to start its LRF claim *ab initio*. Momentarily disregarding the ruinous running of the 120 day filing deadline prior to the initial filing of the LRF claim, there is nothing whatsoever in the record to indicate that the default judgment underlying Petitioner's initial LRF claim was invalid or defective in any way or that it was either reversed or otherwise failed, a requirement for invocation of the savings statute.

25. The documentation of the Division files reflect that Petitioner's attorney somehow had a default judgment - valid and free of legal defect on its face - set aside and then reentered with a new date, all without apparent notice to the Defendant or anything being placed in the record to explain or clarify the court's actions in this or its sister cases in the Fourth

District Court which would appear to be aberrations and highly irregular.

26. The record reflects that Petitioner presented a motion Judge Lynn Davis of the Fourth District Court to have the previously entered default judgment in this matter dismissed under the provisions of U.R.C.P. Rule 41(a) rather than the applicable rules, Rule 55 or Rule 60. U.R.C.P. Rule 41(a) under which the judgment was allegedly set aside provides:

Voluntary dismissal; effect thereof.

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

27. Reliance upon Rule 41(a) to set aside a default judgment is without any basis in law or rule that could be found, and no authority is cited by Petitioner in this action indicating the appropriateness or acceptability of such a use of the rule. Further there is nothing appearing in the record made before the Fourth District Court to establish how Rule 41(a) could apply or could reasonably be thought to apply to the setting aside of a judgment, and without such explanation would seem be both an improper and completely unfounded use of the rule.

28 Default Judgments are governed by U.R.C.P. Rule 55 which specifically addresses the issue of setting aside judgments by default in subsection (2)(c):

Setting aside default. For good cause shown the court may set aside an entry of default and, **if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).** (Emphasis added).

29. U.R.C.P. Rule 60(b) referred to in the above Rule 55 establishes the grounds for which the court may “relieve a party . . . from a final judgment”:

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

30. Although Petitioner was not a party seeking relief from the application of a judgment against it, for the sake of argument it will be assumed that Petitioner was aggrieved by the judgment in its favor and could somehow claim an entitlement to relief from a judgment granting it everything requested in its Complaint. Even with the adoption of the above

assumption, the records on review here show no assertion of a valid defense to its own Complaint being made by Petitioner on behalf of the defendant judgment debtor, a rather absurd contemplation in its own right but one which must be countenanced and endorsed in order to validate Petitioner's actions.

31. Merely being unhappy with a judgment does not entitle an aggrieved party to have an otherwise valid judgment set aside. There is a two-part test which must be met, neither part of which was articulated in the Fourth District Court proceeding:

In order for defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect [or any other reason specified in Rule 60(b)], but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered. *State v. Musselman*, 667 P.2d 1053 (Utah 1983).

32. If Petitioner was truly aggrieved with the original judgment it had obtained which was entirely in its favor, it could have availed itself of the available and appropriate remedies of either appealing the adverse judgment or of satisfying and canceling the offending judgment. Either of these actions were wholly within its power to effectuate without engaging in highly suspect behavior.

33. Beyond an acceptance that the setting aside of the judgment occurred as shown by the records, there is no need to speculate at this time in this forum as to the representations made by an officer of the court on behalf of Petitioner sufficient to induce a judge to set aside an apparently valid judgment under a rule governing pre-trial voluntary non-suits and dismissals upon stipulation of the parties or upon such terms as the court deems proper, and then to proceed to persuade another judge to enter a second judgment without any substantial alteration from the initial judgment other than a change of date.

34. It is sufficient for consideration of this appeal to state that although it appears

Petitioner's filings with the Fourth District Court were, at best, inaccurate and woefully inadequate to support the relief granted, the entry of a new default judgment does not in any way enhance Petitioner's entitlement to recovery from the Lien Recovery Fund. The indisputable and undisputed facts in this case are that Petitioner failed to file its claim within 120 days of the entry of its original judgment which was jurisdictionally fatal to its LRF claim.

35. Petitioner has not filed an appeal upon which relief might be granted due, at least in part, to jurisdictional defects and it is therefore necessary that the Executive Director adopt the holding in *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569 (Utah App. 1989): "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action."

RECOMMENDED ORDER

ORDERED that the request for agency review of Hansen Insulation, Inc. must be and is hereby dismissed.

Dated this the 25th day of February, 1999.



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF
HANSEN INSULATION, INC.

:
:
:
:

ORDER ON REVIEW

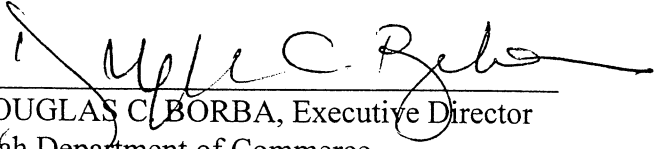
Case No. LRF 1998-1022-01

ORDER

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce and it is, therefore

ORDERED that the request for agency review of Hansen Insulation, Inc. must be and is hereby dismissed.

SO ORDERED this the 2nd day of February, 1999.



DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated.

CERTIFICATE OF MAILING

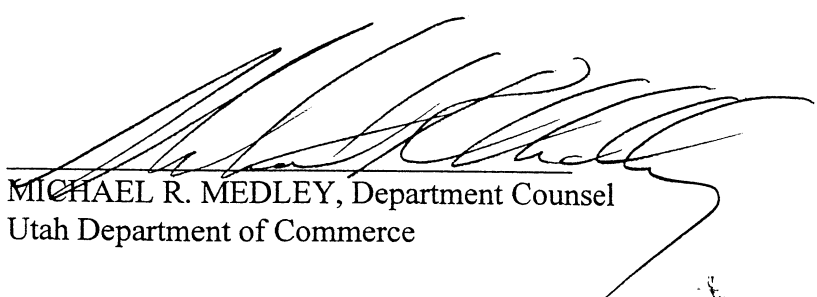
I certify that on the 25th day of February, 1999, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

Howard Chuntz, Esq.
Attorney at Law
1149 West Center Street
Orem UT 84057
ATTORNEY FOR HANSEN INSULATION, INC.

and caused a copy to be hand-delivered to:

Diane Blake, Acting Director
Division of Occupational and Professional Licensing
160 East 300 South, 4th Floor
Salt Lake City UT 84111

Tony Patterson, Esq.
Assistant Attorney General
160 E. 300 South, 5th Floor
Salt Lake City UT 84111



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

TONY R. PATTERSON #5128
Assistant Attorney General
JAN GRAHAM #1231
Attorney General
Heber M. Wells Bldg.
160 East 300 South, 5th Floor
Salt Lake City, Utah 84111
Telephone: (801) 366-0310

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

HANSEN INSULATION, INC.,)	
)	
Petitioner,)	ANSWER OF THE DIVISION OF
)	OCCUPATIONAL & PROFESSIONAL
vs.)	LICENSING
)	
STATE OF UTAH DIVISION OF)	
OCCUPATIONAL AND PROFESSIONAL)	
LICENSING, JAY D. ADAMS, LISA)	Civil No. 980906479AA
ADAMS, FALCON BUILDERS, LLC.,)	
AND DOES 1 THROUGH 25,)	Judge AIRE
)	
Respondents.)	

The State of Utah Division of Occupational and Professional Licensing, Respondent, through Tony R. Patterson, Assistant Attorney General, Answers as follows:

FIRST DEFENSE

1. The Petitioner failed to file its claim with the Residence Lien Restriction and Lien Recovery Fund (hereinafter

Fund) within 120 days of the judgment as required by Utah Code Annotated Section 38-11-204(2)(a). Petitioner filed its Application with the Fund on May 20, 1998, [See Exhibit "A"]. Petitioner stated in its Application to the Fund that its judgment against Falcon Builders was obtained on January 8, 1998, in Case No. 970003140 Fourth District Court, Division II, County of Utah, Provo Department, State of Utah. Petitioner intended the Fund to rely upon that judgment in considering its application. In an effort to accomplish that intent, the Petitioner attached a copy of that judgment to its application. See Exhibit "B"

2. An Affidavit, Certification and Release

Authorization was filed by Petitioner with its Application affirming that "the information contained in this application and the supporting document(s) are free from fraud, misrepresentation, or omission of material fact."

3. Petitioner is precluded from having the Fund consider its claim because Petitioner filed its claim 132 days after its judgment, twelve days past the 120 days stated by law.

SECOND DEFENSE

4. The statutory requirement to file an application found in 38-11-204(2) is jurisdictional. Petitioner failed to file its claim in the time required by law and is therefore barred from recovering from the Fund.

THIRD DEFENSE

5. Paragraphs 1,2,3,6, and 7 of the Petition are admitted.

6. Paragraph 4 of the Petition is denied as a copy of the Order was not provided. It is admitted that the Department of Commerce issued an order dated September 17, 1998, in DOPL Case No. LRF-1998-0520-01 which is a final agency action.

7. Paragraph 5 of the Petition is denied. The Division and the Petitioner are the only parties to the action below.

8. Paragraph 8 is denied as the Request for Agency Review was filed with the Department of Commerce on September 10, 1998.

9. Paragraph 9 of the Petition is denied. It is admitted that the Department of Commerce denied the Petitioner's request for Agency action and upheld the Division's decision of denying the claim on the basis that the Petitioner had failed to file its application with the fund within the 120 days from the date it received a judgment.

10. Paragraph 10 of the Petition is denied. Respondent failed to provide a copy of "Exhibit B".

FOURTH DEFENSE

11. The Petitioner has failed to establish, by the

preponderance of the evidence, that it has met all of the requirements of Utah Code Annotated Section 38-11-204.

FIFTH DEFENSE

12. The Petition fails to comply with the provisions of Utah Code Annotated Section 63-46b-15(2)(a)(vi)-(viii).

SIXTH DEFENSE

13. The Complaint fails to state a claim upon which relief can be granted.

SEVENTH DEFENSE

14. The Division denies each and every allegation of the Petition that they have not heretofore specifically admitted or denied.

WHEREFORE, the Division requests that the court affirm the decision of the Division by denying Petitioner's application due to its failure to submit its application within 120 days as required by law.

DATED this 28 day of December, 1998.


TONY R. PATTERSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 1998, I mailed a true and exact copy of the foregoing Answer of the State of Utah, postage prepaid, to the following:

Howard Chuntz
Attorney for Petitioner
1149 West Center Street
Orem, Utah 84057

Sheni Burnett

Tony R. Patterson, #5128
Assistant Attorney General
Jan Graham, #1321
Attorney General
Attorneys for the State of Utah
160 East 300 South, 5th Floor
Salt Lake City, Utah 84111
Telephone: (801) 366-0310
Facsimile: (801) 366-0315

IN THE FOURTH JUDICIAL DISTRICT COURT, PROVO DEPARTMENT
UTAH COUNTY, STATE OF UTAH

HANSEN INSULATION, INC.,
Plaintiff,

VS.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING, ET AL.
Defendant.

REQUEST FOR RULING

Case No. 98-0406587

Judge Schofield

The Division of Professional Licensing of the Department of Commerce of the State of Utah (“Division”), by and through its counsel, Tony R. Patterson, Assistant Attorney General, hereby request this court rule on Plaintiff’s Motion to Dismiss, filed 1/24/00.

DATED this 14 day of August, 2000.

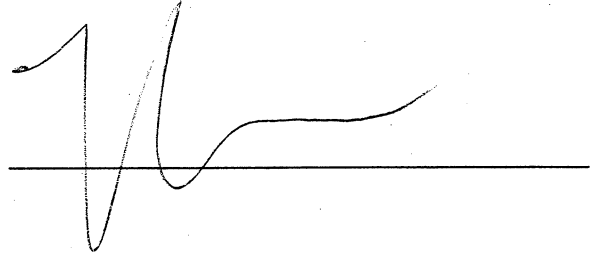
JAN GRAHAM
UTAH ATTORNEY GENERAL

Tony R. Patterson
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on August 14th, 2000, I mailed, postage prepaid, a true
and exact copy of the foregoing **Request for Ruling** to:

Howard Chuntz
1149 West Center Street
Orem, Utah 84057



cc: Earl Webster, DOPL

434759

DATE SERVED 1525 12-10-98
DEPUTY Todd Olson
CONSTABLE A. R. FERNLUND 374-8018

Howard Chuntz, No. 4208
Attorney for Petitioner
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

HANSEN INSULATION, INC.,

Plaintiff,

SUMMONS

v.

DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING, JAY D.
ADAMS, LISA ADAMS, FALCON
BUILDERS, LLC,, and DOES 1 through
25,

Civil No. _____

Defendants.

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to file with the Clerk of the above Court at 125 North 100 West, Provo, Utah 84603, a written answer to the attached Petition for Judicial Review and to serve upon or mail to the plaintiff's attorney, at the address shown above, a copy of your answer within twenty days after service of this Summons upon you.

If you fail to so answer, judgment by default will be taken against you for the relief demanded in the Petition which has been filed with the Clerk of the above Court and a copy of which is attached and herewith served upon you.

DATED November 30, 1998.

Serve defendant at:
Division of Occupational &
Professional Licensing
J. Craig Jackson, Director
160 East 300 South, SLC, UT 84111


Howard Chuntz
Attorney for Plaintiff

Howard Chuntz, No. 4208
Attorney for Petitioner
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

HANSEN INSULATION, INC.,

Petitioner,

PETITION FOR
JUDICIAL REVIEW

v.

DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING, JAY D.
ADAMS, LISA ADAMS, FALCON
BUILDERS, LLC., and DOES 1 through
25,

Respondents.

Civil No. 98-0405-982AA

*Petition Filed on 10/19/98
Case filed on 10/20/98*

*12/15/98
↓
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- Davi confused
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COMES NOW petitioner in the above captioned matter, by and through its attorney, Howard Chuntz, and petitions the Court for judicial review of the Order on Review issued by the Division of Occupational & Professional Licensing (hereafter Division) as follows:

1. Petitioner is Hansen Insulation, Inc., and its mailing address is 175 South Geneva Road, Lindon, Utah 84042.
2. Venue is proper in Utah County because that is where petitioner maintains its principal place of business.
3. The respondent agency is the Division of Occupational & Professional Licensing, c/o J. Craig Jackson, Director, 160 East 300 South, Salt Lake City, Utah 84111.
4. The title and date of the final agency action to be reviewed is an Order on Review in case DOPL Case No. LRF-1998-0520-01, dated September 17, 1998, (a copy of which is attached hereto as Exhibit "A").
5. The persons who are parties in the informal judicative proceedings that led


to the agency action are those named in the caption to this matter, as well as the Division.

6. Petitioner filed a Lien Recovery Fund Claim May 20, 1998.
7. The Division denied petitioner's claim on August 4, 1998.
8. Petitioner filed a Request for Agency Review on or about August 13, 1998.
9. The Division denied petitioner's claim on its Order on Review dated September 17, 1998.

10. Petitioner is entitled to relief for reasons more specifically set forth in his Request for Agency Review submitted herewith as Exhibit "B".

WHEREFORE, petitioner prays that the Division's denial of its claim be reversed and that the Division be required to pay petitioner the sums requested in its claim.

DATED October 16, 1998.


Howard Chuntz
Attorney for Petitioner

re pet